Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1642

In the Supreme Court of the United States

OCTOBER TERM, 1980

PATRICK LORING ROBINSON AND MATTHEW WILFORD MADSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in the circumstances of this case, the admission at trial of an out-of-court statement against the penal interest of the declarant violated petitioners' right to confront adverse witnesses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 635 F. 2d 363.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981. A petition for rehearing was denied on March 4, 1981. The petition for a writ of certiorari was filed on March 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of conspiring to possess 1,000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846. In addition, petitioner Robinson was convicted of using a

facility in interstate commerce with intent to carry on the illegal distribution of narcotics, in violation of 18 U.S.C. 1952(a)(3). Robinson was sentenced to concurrent terms of two years' imprisonment, to be followed by a special parole term of two years. Madsen was sentenced to two years' imprisonment, to be followed by a two-year special parole term.[1]

1. The facts adduced at trial showed that in July 1978 James Ricks informed Carl Roberts that he had recently acquired 3,000 pounds of marijuana and asked Roberts to locate a buyer for it (II Tr. 56-57).[2] Roberts ultimately contacted petitioner Robinson, who, along with petitioner Madsen, was seeking to purchase a large quantity of marijuana on behalf of one Jack Quick (II Tr. 60; III Tr. 87-88; IV Tr. 77-78). Robinson met with Ricks and struck a deal for the purchase of the 3,000 pounds of marijuana, later reduced to a 1,000 pound purchase (II Tr. 64-66, 69; III Tr. 92-93, 95, 185-190). In early or mid-August, petitioners gave Roberts $1,000 in "good faith" money, informing him that they were waiting for the balance of the purchase money to be delivered (II Tr. 70; III Tr. 97). After petitioners had failed once to produce the promised cash, Robinson renegotiated the deal (II Tr. 71-73, 76) and agreed to make a $75,000 down payment on August 17, 1978. On that day, Quick pooled money he had collected from various people, including petitioner Madsen, and gave it to Madsen for delivery. Madsen turned the money over to Ricks and Roberts (II Tr. 81-83; III Tr. 70-75; IV Tr. 8-12, 78-80). Ricks told Madsen that the marijuana was coming by truck and that Madsen should await his telephone call (II Tr. 85).

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[1] In light of *Bifulco* v. *United States*, 447 U.S. 381 (1980), the court of appeals instructed the district court to delete the special parole terms (Pet. App. 6).

[2] "I Tr." through "V Tr." refer to the five volumes of trial transcript.

Ricks called that evening and instructed Roberts to take Madsen to the "drop" location—an abandoned welcome station south of Thomasville, Georgia. Roberts and Madsen proceeded to the designated welcome station, but found no one and no marijuana (II Tr. 93). Throughout the following two days, petitioners and Quick unsuccessfully endeavored to locate either Ricks or the marijuana (II Tr. 107-121; III Tr. 152-155, 191-192, 214-219; IV Tr. 82).[3]

2. During the course of a pretrial hearing to determine whether certain out-of-court statements should be admitted as declarations of a co-conspirator, Quick appeared as a witness (I Tr. 78). Quick had been separately indicted and previously convicted for his role in the conspiracy. When the prosecutor questioned him concerning the marijuana scheme, however, Quick refused to answer, invoking his Fifth Amendment privilege against self-incrimination (I Tr. 79). Although warned that he had been granted immunity and that the court had ordered him to testify, Quick persisted in his refusal.[4] The prosecutor then requested that Quick be declared an unavailable witness pursuant to Fed. R. Evid. 804(a) and called FBI Agent Gary Ramsey as a witness. Ramsey testified (I Tr. 88) that several months after the events in question, he and another agent had interviewed Quick at Quick's office concerning the marijuana transaction. The agents identified themselves to Quick, informed him of the subject of the interview, and advised him of his *Miranda* rights (I Tr. 89). Quick stated that he understood his rights and signed a waiver form (*ibid.*). Quick then detailed his participation, and the roles played

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[3]A telephone call made by petitioner Robinson seeking a friend's help in locating Ricks (III Tr. 99-101) formed the basis for Robinson's conviction under 18 U.S.C. 1952(a)(3).

[4]He was subsequently cited for contempt (I Tr. 79-85).

by petitioners and others, in the marijuana conspiracy (*id.* at 91-100).[5] At the conclusion of the pretrial hearing the court ruled that Ramsey would be allowed to testify at trial as to Quick's statement to him (*id.* at 219). This ruling was reaffirmed at trial after reconsideration in proceedings outside the presence of the jury (IV Tr. 48-70). The district court allowed Ramsey to testify as to Quick's statement on the ground that the statement had been against Quick's penal interest, and its trustworthiness had been established (*id.* at 61, 69). Agent Ramsey was fully cross-examined by petitioners' counsel (*id.* at 84-153).

3. The court of appeals affirmed petitioners' convictions (Pet. App. 1-6). Noting that Quick's statement was against his penal interest, that Quick was unavailable as a witness at trial, that Quick's declaration was fully corroborated, and that the circumstances in which the statement was given substantiated its reliability, the court of appeals concluded that the admission of Quick's statement was authorized by Fed. R. Evid. 804(b)(3) and did "no violence to the defendants' sixth amendment right to confrontation" (Pet. App. 4-5).

ARGUMENT

Petitioners contend (Pet. 6-13) that the admission of Agent Ramsey's account of Quick's out-of-court declaration denied them an opportunity to confront Quick, in violation of the Sixth Amendment. Petitioners do not question, however, the lower court's conclusion (Pet. App. 4)

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[5]Quick stated the following: he had discussed the possibility of buying a large quantity of marijuana with petitioners on several occasions during the summer of 1978 (I Tr. 92-93); Robinson ultimately informed him that he could purchase some marijuana from Ricks in Valdosta, Georgia (*ibid.*). Quick then secured the purchase money and, on August 17, 1978, turned it over to Madsen, who was to deliver the money and obtain 1,000 pounds of marijuana in return (*id.* at 95). Following the abortive pick-up attempt that evening, Quick assisted petitioners in their efforts to locate Ricks and retrieve either the money or the promised marijuana (*id.* at 96-98).

that Quick's statement was adverse to his penal interest. Nor do petitioners dispute the court of appeals' conclusion (*id.* at 4-5) that Quick's statement was made in circumstances that established its trustworthiness, and that the statement was "completely corroborated." Quick's statement was accordingly admissible under the exception to the hearsay rule for statements against interest. Fed. R. Evid. 804(b)(3); *McCormick on Evidence* §§ 277-280 (2d ed. 1972).[6]

The court of appeals correctly concluded that, in the circumstances of this case, the admission of Quick's statement through Agent Ramsey's testimony did not run afoul of the Confrontation Clause. Although the two are not invariably congruent, the hearsay rule and the Confrontation Clause "are generally designed to protect similar values." *California* v. *Green*, 399 U.S. 149, 155 (1970). Accordingly, this Court has established the rule that

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. *Roberts*, No. 78-756 (June 25, 1980), slip op. 9-10 (footnote omitted). Analysis has been focused upon the presence of " 'indicia of reliability which have been widely viewed as determinative of whether a statement may be

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[6]Insofar as petitioners may be understood to question (Pet. 9-10) the power of Congress to create an exception to the hearsay rule not uniformly recognized at common law, the objection is frivolous. No constitutional restraint on such legislation other than the Confrontation Clause of the Sixth Amendment is cited. See note 8, *infra*.

placed before the jury though there is no confrontation of the declarant,' " and which " 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Id.* at 9, quoting *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972).

The courts of appeals generally, like the court below, have applied these principles in passing upon the admission of declarations against interest pursuant to Fed. R. Evid. 804(b)(3). Athough decisions in particular cases rest on the factual constellation presented, the lower courts have agreed that the admissibility under the Confrontation Clause of inculpatory out-of-court declarations by a declarant unavailable to testify at trial is to be determined by weighing the circumstances in which the declaration was made, the presence or absence of any motive to falsify testimony, the presence of corroborating evidence, and the significance of the out-of-court statement in the overall prosecution case. See *United States* v. *Guerra*, No. 80-1110 (2d Cir. Sept. 4, 1980), cert. denied *sub nom. Coletti* v. *United States*, No. 80-728 (Feb. 23, 1981); *United States* v. *White*, 553 F. 2d 310, 314 (2d Cir.), cert. denied, 431 U.S. 972 (1977); *United States* v. *Goins*, 593 F. 2d 88, 90-92 (8th Cir.), cert. denied, 444 U.S. 827 (1979). *United States* v. *Alvarez*, 584 F. 2d 694, 699-702 (5th Cir. 1978); *United States* v. *Palumbo*, 639 F. 2d 123, 129-133 (3d Cir. 1981) (Adams, J., concurring). Where an out-of-court declaration is neither critical to the government's case nor devastating to the defendant's, the declaration is corroborated, and the circumstances in which the declaration was made demonstrate reliability, the evidence has been held to be properly admitted. See *United States* v. *Guerra, supra*; *United States* v. *White, supra*; *United States* v. *Goins, supra*; cf. *United States* v. *Weaver*, 565 F. 2d 129, 135 n.7 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Scholle*, 553 F. 2d 1109 (8th Cir.), cert. denied, 434 U.S. 940 (1977).

In the circumstances of this case the challenged evidence bore sufficient indicia of reliability to justify its admission. Nothing in the record suggests that Quick's statement was or was likely to have been a self-serving attempt either to shift blame to another or to curry favor with the authorities. At the time the agents interviewed Quick concerning the conspiracy, Quick had no reason to believe that a confession likely to send him to prison would serve his interest or that he would be advantaged by incidentally incriminating other persons. The agents made no threats or promises and fostered no hopes of leniency. No "plea bargaining" of any kind occurred. On its face, the statement made no attempt to shift the blame to others; Quick freely acknowledged that he played a major role, if not a leading role, in the conspiracy. In short, the statement could not plausibly be viewed as an attempt by Quick to sacrifice others to save himself.

Moreover, Quick's statement was by no means crucial or devastating, compare *Dutton* v. *Evans*, 400 U.S. 74, 88-89 (1970), for it did not dispositively bolster an otherwise weak case against petitioners. The statement was overwhelmingly corroborated by the government's three principal witnesses, Carl Roberts, Phillip Martin and Stephen Roberts. These witnesses fully detailed petitioners' involvement in the conspiracy. Their description of the plan and petitioners' role in it was more explicit than Quick's, and it corroborated every important detail included in Quick's statement (II Tr. 61-124; III Tr. 81-101, 142-148). Many of the less important details in the statement were corroborated by other evidence such as bank records (III Tr. 70-75), telephone company records (IV Tr. 35-40), and other witnesses (III Tr. 191-192, 214-219, 227-229). In view of the extent of the testimony inculpating petitioners, Quick's statement was of peripheral significance at most. Moreover, petitioners fully exploited their opportunity to cross-examine Ramsey on

the circumstances under which the statement was made (IV Tr. 84-153).[7]

Finally, the trial court instructed the jury (V Tr. 118-119) that Quick's statement to Ramsey constituted accomplice testimony and that the jury "must weigh it with caution and great care and * * * must consider the inducements for such testimony, the interest of the witness, the expectations of the witness or any other reasonable factor which might influence this testimony." In these circumstances, both courts below correctly concluded that, when Quick became unavailable, admission of his statement did not violate petitioners' rights under the Confrontation Clause.

Petitioners' contention that the decision of the court of appeals is contrary to the teaching of this Court is unfounded. *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and *Bruton* v. *United States*, 391 U.S. 123 (1968), on which petitioners primarily rely, are readily distinguished. The evidence held to have been erroneously placed before the jury without cross-examination in *Douglas* was the only direct evidence of a key fact in issue, 380 U.S. at 419, and was described as "a fundamental part of the State's case * * * [which] added critical weight" thereto. *Id.* at 420. See *Dutton* v. *Evans, supra*, 400 U.S. at 87; *Parker* v. *Randolph*, 442 U.S. 62, 74 (1979) (opinion of Rehnquist, J.). In *Bruton*, the evidence held inadmissible was hearsay, not admissible under any applicable exception with respect to the petitioner, and the Court noted the critical weight of the particular evidence in the setting of the case. 391 U.S. at 128. The Court emphasized that it "intimate[d] no view

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[7]Since Quick's personal knowledge of the identity and role of other participants in the drug scheme was abundantly established by other evidence at trial, "[i]t is inconceivable that cross-examination could have shown that [Quick] was not in a position to know whether or not [petitioners were] involved in the [conspiracy]." *Dutton* v. *Evans*, 400 U.S. 74, 88-89 (1970) (opinion of Stewart, J.).

whatever that * * * exceptions [to the hearsay rule] necessarily raise questions under the Confrontation Clause." *Id.* at 128 n.3. The admissibility of the out-of-court declaration in this case under Fed. R. Evid. 804(b)(3) and the cumulative character of the evidence at issue here serve to distinguish this case from *Bruton*. See *Ohio* v. *Roberts, supra*, slip op. at 9-10; *Dutton* v. *Evans, supra*, 400 U.S. at 82-90.[8]

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[8]Contrary to petitioners' contention (Pet. 9-10), the fact that the expansion of the declaration against interest exception to the federal hearsay rule effected by Fed. R. Evid. 804(b)(3) is of comparatively recent vintage does not preclude a determination that the indicia of reliability necessary to satisfy the Confrontation Clause are present as to evidence admitted thereunder. The exact contours of exceptions to the hearsay rule as they exist at any given point in time are not to be equated with the mandate of the Sixth Amendment. *Dutton* v. *Evans, supra*, 400 U.S. at 82. As the framers of Rule 804(b)(3) noted, "[t]he refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly* v. *United States*, 228 U.S. 243 * * * (1913)." Notes of Advisory Committee on Proposed Rules, Rule 804. Moreover, Rule 804(b)(3) was designed to reflect the trend of decisional law abandoning this limitation on the declaration against interest. *Ibid.* In framing Rule 804(b)(3), Congress deliberately chose not to freeze the development of the constitutional law of confrontation by codification. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 22 (1974); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 12 (1974). As noted above, page 6, the court below and the other courts of appeals have accepted the mandate of Congress in their careful application of the Confrontation Clause to limit the use of inculpatory declarations against penal interest, consistent with the decision of this Court. Thus, whether Rule 804(b)(3) is, as we contend, a "firmly rooted hearsay exception" as to which "[r]eliability can be inferred without more," *Ohio* v. *Roberts, supra*, slip op. 9, or whether on the other hand, it was necessary to find "particularized guarantees of trustworthiness," *id.* at 10, the decision of the court of appeals was plainly correct, and calls for no further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

DEBORAH WATSON
Attorney

MAY 1981

DOJ-1981-05